IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1468

M. MORRIN & SON COMPANY, INC.
Petitioner

v.

BURGESS CONSTRUCTION COMPANY, and
GENERAL INSURANCE COMPANY OF AMERICA
Respondents

REPLY BRIEF OF PETITIONER

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SUBJECT INDEX

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ARGUMENT

Petitioner ("Morrin") files this Reply Brief because it is concerned that the Court may be misled as to the issues that justify the issuance of a Writ of Certiorari in this case by the simplistic characterization of such issues in Respondent's Brief in Opposition. In particular, Respondent ("Burgess") portrays Morrin's objections to be those of a disappointed loser whose judgment in damages was vacated and who was subjected to an adverse judgment on the basis of post-judgment legal arguments. If that characterization of the case were correct, no procedural irregularity would indeed exist. The error of that characterization can only be seen by an examination of the entire record; Petitioner seeks certiorari in the belief that the record, when examined, will show:

1. That the trial court clearly perceived the facts favorably to Morrin as shown by its comments and the admissions of Burgess throughout the trial. On the basis of such perceptions and admissions the court directed that findings, conclusions and judgment be prepared by and for Morrin at the

close of trial.[1] The flavor of the court's position on the facts is shown by excerpts from the transcript appended hereto as Appendix A.

2. On March 8, 1974, when the Burgess post-trial motions were being set, the court stated apologetically to counsel as follows:

> THE COURT: I want to say here and now that I did not give Mr. Watkiss an opportunity — not only I didn't give him an opportunity to argue it, I didn't give him an opportunity really to put his case on. I was going away and I wanted to get something decided on the record. And that case is far from finished. I treated my friend David very badly, and I want publicly to say that.
>
> MR. WATKISS: Thank you, your honor.
>
> THE COURT: And I want that transcript before we go on so that we can make amends. I don't mean I am going to decide the lawsuit in your favor, but I am going to give you the opportunity now that I denied you at the time to as thoroughly go into the matter as you desire. (Tr. 1331-1332).

Despite the court's apparent concern about Burgess' inability to "put on its case," no additional evidence was offered or taken at the hearing on post-judgment motions.

3. On argument of Burgess' post-judgment motions, the court was still firm in its original evaluation of the facts and its conclusions. The court's thinking at that time is shown by excerpts from the transcript appended hereto as Appendix B.

4. Thereafter, the court, on its own motion and without indication of the subject matter to be discussed, summoned

[1]The findings and conclusions prepared by Morrin were entirely consistent with the court's oral evaluation of the evidence; the subsequent findings prepared by Burgess were entirely inconsistent with that evaluation.

counsel for further argument on June 28, 1974. After short statements by the parties, the court announced that it had reread *United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946), and had concluded that that case controlled the interpretation to be given to the critical contract terms in this case (Petition for Writ of Certiorari, page 4). Burgess was directed to prepare proposed findings of fact, conclusions of law and a judgment.

The unusual procedural history by which the findings, conclusions and judgment were altered in this case was outlined in Morrin's brief to the Court of Appeals (Appendix C); and 19 of the findings were asserted to be clearly erroneous. Petitioner's present concern was adequately raised in the courts below. *Muncie Gear Works* v. *Outboard, Marine & Mfg. Co.*, 315 U.S. 759 (1942); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, *reh. denied*, 340 U.S. 939 (1951); *Trout* v. *Pennsylvania R.R. Co.*, 300 F.2d 826 (3d Cir. 1962).

The Court of Appeals affirmed on grounds that the findings were not clearly erroneous and with the observation that the " 'clearly erroneous' rule creates a difficult burden for an appellant" (526 F.2d, at 116). It gave no consideration in applying that rule to the unusual procedures employed by the trial court. The cases cited by Petitioner and Respondent reveal a high degree of conflict and confusion in the Circuits as to the standards for review of findings prepared wholly by counsel for a litigant. The Circuits require the guidance of this Court in this situation in two respects:

> (1) The procedural prerequisites for the adoption of findings when counsel take part in the process. *Compare Chicopee Mfg. Corp.*, v. *Kendall Co.*, 288 F.2d 719 (4th Cir. 1961) *with Bradley* v. *Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967).
>
> (2) The weight to be given on appeal to findings

adopted by the trial court but prepared wholly by counsel for one party. (Naturally, the weight given on appeal will depend to some extent on the actions of the trial court prior to adoption.) *Compare In Re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970) *with Professional Golfers Association of America* v. *Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir. 1975).

The procedural issues so clearly raised by this case have long troubled courts, members of the bar and those laymen whose rights and property are affected by the functioning or superficial non-functioning of the judicial process. This case provides a vehicle for this Court to promulgate standards that will permit counsel to participate usefully in the formulation of findings without infringing upon the judicial sphere or appearing to subvert the judicial process.

Respectfully submitted,

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APPENDIX A

Despite apparent denials by Burgess in its Brief in Opposition, trial counsel for Burgess made several admissions with regard to delays and liability for the consequences thereof:

THE COURT: And the contract says you are supposed to get out of there by April 1.

MR. WATKISS: That is right, your Honor.

THE COURT: Now, you weren't out of there by April 1, and that is a fact of life in this lawsuit.

MR. WATKISS: We have to live with that one, Judge.

THE COURT: We are all tied to that.
(Tr. at 1022.)

* * *

THE COURT: I agree with that. We have a contract in this case that says that by June 1 Burgess had to do something or another.

MR. ASHTON: Gate liners and gates.

THE COURT: He was to get the gate liners and gates in, and he was supposed to have that stilling basin finished.

MR. ASHTON: April 1.

THE COURT: April 1. And it looks to me as though you fellows have confessed that.

MR. WATKISS: In my opening statement two weeks ago there are two things I confessed before we put any evidence on. One—

THE COURT: Well, I am right.

MR. WATKISS: Absolutely. We were delayed on the access, and we were delayed on the gate chamber. No question about it.
(Tr. at 1029-1030.)

MR. WATKISS: One other point. I think it is worth addressing to your Honor because I am getting into it next, and that is this gate chamber situation.

THE COURT: Well, you are "in the soup" on that.

MR. WATKISS: No question — I said that going in. I said we couldn't get the steel and whatever cost this man had because he couldn't get in that gate chamber and pour it out, whatever cost — if he put a railroad back in which he didn't have to put in, if he had to crew up and go back in and do it again, you bet it wasn't his fault; it was the steel liners for which we were responsible, and we couldn't get them.

MR. ASHTON: That is our lawsuit.

MR. WATKISS: There is no question about that, Judge.

THE COURT: I think that is the lawsuit.
(Tr. at 1032).

* * *

MR. WATKISS: . . . Now, anyone can be critical of people, but that is his profession. That is what he does for a living, San Francisco, and a very well-known, nationally, world-known, consulting engineering firm, Jacobs & Associates, worked for every big contractor around. He spends 400 hours and carefully reads all of these detailed facts that are in the records and available for study, carefully reviews the plans and specifications, makes his determination on the delay factor, the winter-work factor, all of those things, and he comes up with an estimate of what that job — the reasonable value of the work was; in other words, what it should have been done for, including the profit and all the rest that a good, responsible contractor would get. And he gave the Court a figure. And I was not too happy with it because it was higher than I thought it should have been, but that was

his opinion. It was $821,000, which was $300,000 more than we had paid the man and $100,000 more than the contract provided we owed him.

THE COURT: He was your witness.

MR. WATKISS: He was my witness. I was stuck with that, your Honor, and I will admit it to the Court.

* * *

And, of course, again it depends — and there is no dispute, we computed out, in addition to that three hundred, looking at the record as it was before your Honor, there was the equipment cost that we have admitted; that, if we are found by the Court to be responsible for a breach in addition and he determines quantum meruit is the appropriate type of award, in addition to the three hundred that this man says is the reasonable value that has been given on this type of service — in addition to that we would owe for the use of his equipment thereafter, which is another $38,000. Now, that is on the record. We agreed on those figures because we either stipulated to them or our witnesses presented them.
(Tr. at 1475-1477).

* * *

THE COURT: I don't know how you can minimize that arctic weather over there in the Strawberry region in which we have all lived around here. I have lived over there in that region. And when you are talking about doing concrete work, I am amazed that anybody could do concrete work in the kind of weather you have over at the Strawberry Dam, just amazed that anybody could do anything of the kind in the kind of weather we have.

I mentioned the other day I went to school in 40 degrees below zero weather up there. And, as a matter of fact, the dam area we are talking about here is higher yet than the towns.

Now, I have heard about all I want to hear about that in an attempt to minimize the weather conditions and the difficulty of the job arising out of those weather conditions.

MR. WATKISS: Your Honor, we are not attempting to minimize—

THE COURT: I think we can take judicial notice of the kind of weather conditions they had over there.
(Tr. at 926-927).

Burgess' attempts to imply in its brief that the evidence somehow makes inescapable a conclusion that Morrin's inability to complete on schedule was due to its own poor work. Although there was certainly testimony that Morrin had problems on this project, the statement of Bureau of Reclamation Inspector Mudgett, which was noted by the Court of Appeals (526 F.2d, at 116 n.9) and so heavily relied upon here by Burgess, that Morrin's work was "substandard", was part of an offer of proof and *was not admitted into evidence* by the trial court. (Tr. at p. 1222). Moreover, Mr. Mudgett's testimony on this point was directly contradicted by that of Mr. D'Alessandro, Mudgett's superior, who testified that the work was satisfactory, although slow in getting started. The court again made its view of this type of evidence abundantly clear:

THE COURT: I know what his testimony was. I heard it. Now, the plain fact of the matter in this lawsuit is that Morrin was in difficulty because he was delayed by Burgess in getting in there. He is delayed in several ways. Failure to deliver the gates and liners is one important way. The man is out of sequence on his schedule, how he proposed to do that work, and he never got back into sequence, of course. Always out of it.

Now, you are asking this man to testify as to whether or not Morrin's work was satisfactory after all this de-

lay and after all of the obstacles that were put in his way. After he had commenced pouring some cement and was in the process of pouring some cement, was that being done in a satisfactory way? Was it being done slowly? Was the work slow? Everything Morrin did after he was delayed and after he was obstructed and after he was thrown out of sequence by Burgess was slow, was late, and he ran into all kinds of difficulties, as a matter of fact, because he was out of sequence trying to do that job.

Now, to ask this Bureau of Reclamation fellow to come down here and answer a general question: Was he proceeding satisfactorily at this late date? Was he proceeding slowly at this late date? Now, I don't think it makes much difference whether I sustain the objection and tell you you can't answer that or whether I let him answer that, because I think the weight of that response is negligible. So I am going to allow the response. You can answer that.
(Tr. at 1160-1161).

APPENDIX B

The court considered at great length the applicability of *United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946) to the facts of this case and made plain its thoughts upon that subject:

> THE COURT: Let me talk to you a little bit about this now.
>
> Mr. Justice Blacks says — and I think this is critical in the opinion — "In no single word, clause, or sentence in the contract does the Government expressly covenant to make the runways available to respondent at any particular time."
>
> Now, The Government isn't involved here but Burgess is.

MR. WATKISS: Same thing, your Honor.

THE COURT: Yes, same thing. If you want to paraphrase it, "In no single word, clause, or sentence in the contract does Burgess expressly covenant to complete the excavation."

Now, that just isn't so.

MR. ASHTON: A, b, or c.

THE COURT: That just isn't so in this case.

"A." says: "Lower tunnel excavation must be complete to allow access from both ends by 1 April 1971.

"b. Excavation for lower tunnel chute and stilling basins for both chutes must be completed by 1 April 1971.

"c. Gates and steel tunnel liners for lower gate chamber must be delivered on or before 15 May 1971 and installed not later than 1 June 1971."

I don't know how more clearly it could be stated what

the obligation of the excavator is with respect to getting the job done.

Then your last sentence that you rely on:

"The subcontractor will be entitled to a time extension equal to any delay created by a, b, or c above."

But it doesn't say that is the only thing he is entitled to. It doesn't say that is the only thing by any means. And I don't think Foley is in point.
(Tr. at 1416-1417).

* * *

THE COURT: You are doing him out of the benefit of his contract. You get him in a hole. You get him in a hole so he can't perform. He gets into so much trouble that finally he says, "Be my guest."

And who got him into that trouble? You did. You got him in that trouble.
(Tr. at 1423-1424).

* * *

THE COURT: Well, I am prepared to take a position on this one, and I have indicated what it is.

I think Burgess assumed an obligation that it didn't perform.
(Tr. at 1429).

APPENDIX C

Morrin explained the unusual procedural history of the case in its "Brief of Appellant" and argued its impropriety:

> The Court's overall view of the proceedings was expressed near the end of trial when the Court stated that BURGESS had clearly breached the contract, that MORRIN'S sequence of operations had been destroyed and all of that had resulted from BURGESS' failure to carry out its obligations under the contract (Trans. p. 1160 through 1163).
>
> Thereafter, and on the 12th of November, 1973, the Court entered Findings of Fact, Conclusions of Law and Judgment in favor of MORRIN predicated upon breach of contract on the part of BURGESS.
>
> After the post trial motions had been filed by BURGESS, the Court noted the matter for further hearing on May 9, 1974. At that time it made various comments supporting the position of MORRIN. It was at that time that the Court clearly indicated that it was BURGESS who got MORRIN into trouble (Trans. p. 1423 through 1424), that the obligations of BURGESS to furnish the areas of construction site as contracted were unqualified obligations of BURGESS (Trans. p. 1425) and that BURGESS did not perform the obligations which it had assumed toward MORRIN (Trans. p. 1429).
>
> After the hearings on May 9, 1974, nothing transpired until shortly before June 28, 1974. At that time the Court, upon its own motion, notified counsel to appear for additional argument. The notice did not specify any particular matter upon which the Court wished counsel to comment. At the end of a short argument, the Court made a 180° departure from its prior decision

> and held, based on *United States* v. *Foley, supra,* that MORRIN was entitled only to a time extension.
>
> * * *
>
> There was no indication by the Court at any time that any fault was found with the performance of work by MORRIN only that under *Foley* an anticipatory breach was committed when MORRIN stated that due to the winter conditions it would not be able to complete its contract on dates unilaterally established by BURGESS on the date of termination.
>
> There is no logic, common sense or justice in such a decision.
>
> (Brief of Appellant, at pp. 35-36).

The Brief also argued the inconsistency of the trial Court's second findings with the first set entered and with much of the evidence (Brief of Appellant, at pp. 4-5), as well as the signing of the Burgess findings and conclusions without hearing or change. (Brief of Appellant, at p. 9). *See also,* Brief of Appellant, at pp. 32, 55. Further argument on the same theory was made in Appellant's Reply Brief, at pp. 10 and 15-16.